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No. 17

In the Supreme Court of the United States

October Term, 1946

THE UNITED STATES, PETITIONER,

JOHN J. PETER & Co., INC.

PETITION FOR A WRIT OF HABEAS CORPUS TO THE COURT
OF CLAIMS

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement.....	4
Specification of errors to be urged.....	11
Reasons for granting the writ.....	13
Conclusion.....	16

CITATIONS

Cases:

<i>Cudahy Bros. Co. v. United States</i> , 155 F. 2d 905.....	13
<i>Graves v. United States</i> , 62 F. Supp. 231.....	13
<i>Leamer Plumbing and Heating Co. v. United States</i> , 64 F. Supp. 981.....	13
<i>Louisville Flying Service, Inc. v. United States</i> , 64 F. Supp. 988.....	13
<i>L. Vogelstein & Co. v. United States</i> , 262 U. S. 337.....	13
<i>Olsen v. United States</i> , 262 U. S. 246.....	13, 14
<i>Seaboard Air Line Ry. v. United States</i> , 261 U. S. 299.....	13
<i>Standard Oil Co. v. Southern Pac. Co.</i> , 266 U. S. 146.....	14
<i>United States v. Delano Park Homes, Inc.</i> , 146 F. 2d 473.....	13, 15
<i>United States v. Miller</i> , 317 U. S. 369.....	14
<i>United States v. New River Collieries Co.</i> , 262 U. S. 341.....	13, 14
<i>United States v. Petty Motor Co.</i> , 327 U. S. 372.....	15
<i>United States ex rel. Tennessee Valley Authority v. Powelson</i> , 319 U. S. 266.....	16
<i>United States of America v. The Illinois Pure Aluminum Company</i> , No. 660, this Term.....	12

Statute:

Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 190, 56 Stat. 181, the Act of June 30, 1943, c. 181, 57 Stat. 271, the Act of June 28, 1944, c. 267, 58 Stat. 694, and the Act of June 30, 1945, c. 208, 59 Stat. 271 (50 U. S. C. App., Supp. V, 721).....	2, 6
--	------

II

Miscellaneous:	Page
Executive Order No. 9290, Dec. 5, 1942 (7 F. R. 10170) ..	4
Office of Price Administration Maximum Price Regulation No. 148, 7 F. R. 5821	8
Revised Maximum Price Regulation No. 148, effective Nov. 2, 1942, 7 F. R. 5909	6, 8, 9, 14
Amendment No. 1, effective Jan. 19, 1943 (8 F. R. 544)	8
Office of Price Administration Maximum Price Regulation No. 469, effective Oct. 4, 1943 (8 F. R. 12562)	7

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 862

THE UNITED STATES, PETITIONER

v.

JOHN J. FELIN & Co., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on October 7, 1946.

OPINION BELOW

The opinion of the Court of Claims (R. 12-14) is reported at 67 F. Supp. 1017.

JURISDICTION

The judgment of the Court of Claims was entered on October 7, 1946 (R. 15). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

(1)

(2)

(3)

QUESTION PRESENTED

Whether in a suit for just compensation by the owner of meat and meat products requisitioned by the United States in the exercise of its wartime powers, the actual market price or the replacement cost was the proper measure of just compensation where the market price, which was the maximum applicable price as fixed by the Office of Price Administration, was less than the owner's cost of replacement.

STATUTE INVOLVED

The pertinent portion of the Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, the Act of June 30, 1943, c. 181, 57 Stat. 271, the Act of June 28, 1944, c. 307, 58 Stat. 624, and the Act of June 30, 1945, c. 208, 59 Stat. 271 (50 U. S. C. App., Supp. V, 721) provides as follows:

Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1946, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such

property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property, is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., Title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property.

STATEMENT

Respondent, a corporation, is and for many years has been, engaged in the business of packing pork products. It buys hogs in the Chicago, St. Louis, and Indianapolis markets and transports them to Philadelphia where the hogs are slaughtered and converted into various pork cuts and products. Respondent is a wholesaler and sells and distributes its products through trucks maintained by it to retail dealers in the metropolitan area of Philadelphia (R. 5).

On December 5, 1942, the President of the United States issued Executive Order No. 9280, authorizing and directing the Secretary of Agriculture to assume full responsibility for and control over the Nation's food program in order to assure an adequate supply and efficient distribution of food to meet war and essential civilian needs, to assign food priorities, to make allocations of food for human and animal consumption to Government agencies and for private account, and to purchase and procure food for such Government agencies (R. 5).

On February 2, 1943, the Food Distribution Administration, an agency of the Department of Agriculture, in charge of procuring meat for Government agencies, sent respondent a priority order requesting it to deliver 225,000 pounds of lard and pork products, which are hereinafter described, to the Federal Surplus Commodities Corporation, an agency of the United States Gov-

ernment, for delivery under the Lend-Lease program. The order stated that respondent would be paid the ceiling prices applicable under provisions of the Office of Price Administration regulations, and that respondent was required to fill the order in preference to any other contract or purchase order of lower or no priority rating. Prior to the receipt of this order, respondent had supplied pork products to several Government agencies. By February 2, 1943, respondent had decided it could no longer afford to sell to the Government at the prices offered by Government agencies and refused to make delivery. On March 1, 1943, the Director of the Food Distribution Administration, acting under the authority of Executive Order No. 9280 and the specific authorization of the Secretary of Agriculture, made a determination pursuant to the Act of October 16, 1941 (55 Stat. 742), that it was necessary to requisition the property from respondent. The requisition was issued on March 1, 1943, and on March 3, 1943, the United States took title and possession of the following described property which was owned by respondent and was then located at its packing house in Philadelphia, Pennsylvania:

40,000 pounds Cured Regular Hams, 14 to 18 lb. range.

40,000 pounds Cured Clear Bellies, 10 to 14 lb. range.

15,000 pounds Cured Picnics, 6 to 10 lb. range.

30,000 pounds Salted Fatbacks, 8 to 12 lb. range.

100,000 pounds Refined Pure Lard, 1 lb. prints (30 lbs. to carton) (R. 5-6).

Pursuant to instructions, on March 24, 1943, respondent prepared and filed its claim, stating that fair and just compensation for the property requisitioned was the sum of \$55,525.00, which included \$16,250 for the lard and \$39,275 for the pork cuts. Respondent claimed that \$39,275 was the cost of replacing the pork cuts and that the figure was arrived at on the basis of a live hog cost of \$15.90 per cwt., at Chicago, Illinois, on the date of the requisition. Respondent also claimed that the ceiling prices provided for in applicable regulations of the Office of Price Administration (the prices offered by the United States) were less than fair and just compensation for the property because such ceiling prices were based upon a live hog cost at Chicago at \$13.15 per cwt. (R. 6-7).

On May 7, 1943, the Director of the Food Distribution Administration made a preliminary determination that fair and just compensation for the property requisitioned from respondent was the sum of \$40,656.28, including \$15,543.78 for the lard and \$25,112.50 for the pork cuts. The amount determined was computed at the ceiling prices authorized by Revised Maximum Price Regulation No. 148 of the Office of Price Admin-

istration for sale at wholesale of such products in carload quantities at Philadelphia, Pennsylvania. On May 8, 1943, respondent received notice of the preliminary determination and, on May 15, 1943, wrote the Office of Food Distribution accepting the award for the lard, but objecting to the value determined for the pork cuts on the ground that it was less than the cost of producing or replacing the property (R. 6-7).

On May 22, 1943, the Director of the Food Distribution Administration made a final award for the pork cuts, in the sum of \$25,112.50. Respondent was advised that the preliminary award could not be increased because the Government could not pay more than the ceiling prices fixed by the Office of Price Administration. Respondent refused to accept the amount awarded as the value of the pork cuts and was paid 50 percent thereof or \$12,556.25.¹ (R. 7).

Price ceilings on the sale of dressed hogs and wholesale pork cuts were first established by the Office of Price Administration on March 9, 1942.² On March 3, 1943, the date respondent's property

¹ Respondent accepted and was paid the full amount awarded as compensation for the lard.

² There were no price regulations governing the sale of live hogs until September 11, 1942, when Maximum Price Regulation No. 469, establishing ceiling prices for live hogs, effective October 4, 1942, was issued. The principal item in the cost of producing products sold by respondent was the amount it had to pay from time to time for live hogs (R. 7).

was requisitioned, all sales of pork cuts and pork products at wholesale were governed by the provisions of Revised Maximum Price Regulation No. 148 (effective November 2, 1942) and Amendment No. 1 thereto (effective January 18, 1943). Each of these regulations established as the maximum prices for dressed hogs and wholesale pork cuts, the prices prevailing during the period March 3, 1942 to March 7, 1942, inclusive (R. 7-8).

Rising prices caused some packers to sell at a loss under their wholesale pork ceilings. In late December 1942, hog prices again began to rise, reaching an average of \$15.59 per cwt. for the month of March 1943. For the week ending March 6, 1943, the Chicago average live hog price was \$15.80 per cwt., the highest price attained since October 1920. During the months of February and March 1943, the current prices for livestock were above the levels reflecting a proper relationship to the existing wholesale meat ceilings (R. 8). During the months of May, June, and July 1943, the hog price was low enough to permit slaughterers to make a profit, but in early August another price rise threatened to efface slaughterers' margins. Although the seasonal nature of livestock marketing made periods of loss a commonplace in the packing industry, slaughterers were generally able to balance seasonal losses with profits at other times (R. 9-10).

On July 17, 1942 and March 18, 1943, respondent filed written protests to Maximum Price Regu-

9

lation No. 148 and Revised Maximum Price Regulation No. 148, respectively, with the Price Administrator. Orders and accompanying opinions denying respondent's protests were entered by the Price Administrator on April 23, 1943 and July 5, 1943. Respondent made no attempt to have these decisions reviewed by the Emergency Court of Appeals as authorized by the Emergency Price Control Act of 1942, nor did it file any complaint in that court after the orders denying respondent's protests were entered (R. 10).

When respondent's property was requisitioned, there was an acute shortage of pork products. As a result, offerings on the market of pork products, particularly of the better cuts of pork, were considerably below normal, and supplies available for the general trade were far short of the demand. On March 13, 1943, the Director of the Food Distribution Administration issued an order requiring each slaughterer operating under Federal inspection to set aside for war uses 45% of all pork and designated percentages of other meat derived from the slaughter of hogs and other livestock (R. 10-11).

Respondent unsuccessfully attempted to replace the property taken by defendant by purchasing pork cuts in the market. Accordingly, in conformity with its usual practice, it purchased and slaughtered live hogs to replace the property requisitioned at a cost of \$30,293 (R. 11). The ceiling price of the requisitioned property when

sold at wholesale and in carload quantities at Philadelphia, Pennsylvania, on March 3, 1943, was \$25,112.50 (R. 11).^{*}

At the time respondent's products were requisitioned, there was a ready market for such products in Philadelphia under prevailing OPA ceiling prices. Prior to and after the date of requisitioning, respondent regularly sold pork cuts and other pork products at these prices. Throughout this period, respondent continued to buy live hogs at prevailing prices and to sell pork products derived from them at the authorized ceiling prices even when the cost thereof was greater than the wholesale prices obtained from them. Respondent chose to do this in order to protect its good will and the investment in its business, to supply customers who were dependent

^{*}The purchase order and requisition issued by petitioner called for the delivery of respondent's pork cuts in carload quantities, whereas respondent customarily sold such products in lots of less than 500 pounds each. Respondent's customers, approximately 5,000 in number, are retail meat dealers located in the Philadelphia area whom respondent served by means of 57 route trucks. The ceiling price of the requisitioned property when sold at wholesale in lots of 500 pounds or less in Philadelphia at the time of the taking was \$26,362.50. The excess of this figure over the ceiling price of respondent's property when sold at wholesale results from the fact that provisions of Office of Price Administration Maximum Price Regulations which established the market prices authorized the reduction of \$1.00 per cwt. for sales at wholesale in carload quantities. The \$1.00 differential was intended to partly defray the expense in delivery wholesale in less than carload quantities (R. 11-12).

on it, and to retain its organization of plant and company employees (R. 11).

The court below rejected, as the test of just compensation for respondent's requisitioned meat, the current market price which was the OPA ceiling price and held that since respondent had to replace the articles taken and was unable to do so at the price paid it by the Government, respondent was entitled to the replacement cost of its property. The court concluded that the Government's obligation was to put respondent in as good a position pecuniarily as it was before the property was taken and that payment of the OPA ceiling price would not accomplish this, since the OPA ceiling price was less than the price respondent had paid to acquire the meat and the replacement cost was greater than the OPA ceiling price at which respondent had to sell its products. It accordingly awarded judgment for the respondent in the amount of \$17,736.75, the difference between the 50 per centum which the Government had paid the respondent and the replacement cost of the requisitioned property (R. 12-14).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the market value at the time of the requisition constituted the measure of just compensation in the circumstances of the case.

2. In applying as the test of just compensation for the respondent's requisitioned meat the replacement cost thereof.

3. In fixing as just compensation for the meat products requisitioned an amount in excess of the respective maximum market prices thereof as fixed by regulations of the Office of Price Administration at the time of its requisition.

4. In entering judgment for the respondent.

REASONS FOR GRANTING THE WRIT

1. This case presents one aspect of the important question of the effect of the Office of Price Administration's maximum prices fixed by the Price Administrator on the just compensation to be awarded where the United States, in the exercise of its powers under the Act of October 16, 1941, requisitions private property for wartime needs. There are now pending against the United States a large number of actions, involving considerable amounts of money, for awards for property taken under the national defense and wartime requisitioning program. In many of these cases issues similar to that presented here will have to be resolved.*

In addition, the United States Circuit Court of Appeals for the Seventh Circuit, on June 4, 1946,

*The Government's petition for a writ of certiorari in the companion case of *United States of America v. The Illinois Pure Aluminum Company*, No. 860, this Term (67 F. Supp. 955 (Ct. Cls.)), refers more fully to the pending litigation turning on decision of the questions presented in these cases.

reached a conclusion opposite to that of the Court of Claims in the case at bar. *Gudaby Bros. Co. v. United States*, 155 F. 2d 905. On almost identical facts, the Circuit Court of Appeals held that the Office of Price Administration's ceiling price for beef carcasses established the highest market price and represented the maximum limit of just compensation for the property requisitioned. Thus, there exists between the Circuit Court of Appeals and the Court of Claims a direct conflict on an important question of law which requires settlement by this Court.¹

2. The decision of the court below is clearly wrong. It is well established that the criterion for determining just compensation is the market value of the requisitioned property at the time of the taking. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 306; *L. Vogelstein & Co. v. United States*, 262 U. S. 337; *United States v. New River Collieries Co.*, 262 U. S. 341; *Olson v. United States*, 292 U. S. 246. "The worth of a

¹ In *United States v. Delano Park Home*, 126 F. 2d 473, the Circuit Court of Appeals for the Second Circuit stated by way of dictum: " . . . when competent authority has fixed prices at a maximum, or has denied owners some specific use of their property, it is patently a disregard of its authority, either indirectly to allow a higher price on condemnation, or to allow the price to be figured in disregard of the limitation imposed" (p. 474). To the same effect are *Groves v. United States*, 62 F. Supp. 231 (W. D. N. Y.); *Loomer Plumbing and Heating Co. v. United States*, 64 F. Supp. 931 (S. D. N. Y.); *Louisville Flying Service, Inc. v. United States*, 64 F. Supp. 938 (W. D. Ky.).

thing is the price it will bring." *Standard Oil Co. v. Southern Pac. Co.*, 268 U. S. 146, 158. Where a ready market exists resort cannot be had to other data to ascertain value. *United States v. New River Collieries Co.*, *supra*. See also *United States v. Miller*, 317 U. S. 369, 374, and *Olson v. United States*, *supra*, at page 255. Since, as the court below expressly found (R. 11), there prevailed a ready market at the maximum prices established by Revised Maximum Price Regulation No. 148 for the respondent's products, at the time and place of the taking, those prices constituted just compensation. The fact that those prevailing market prices were limited by valid maximum price regulations did not impair the existence of an actual market or its effectiveness as a measure of just compensation. The maximum prices fixed by the Price Administrator, which had not been attacked by the respondent in the Emergency Court of Appeals, were valid, and the respondent's products could not be legally sold for more than those prices. Consequently, there could be no market price in excess of those fixed by the Price Administrator. Thus, the erroneous use by the court below of the higher replacement cost as a measure of just compensation resulted in giving the respondent a greater return for its property than it could have lawfully obtained had it sold the products in the normal course of its business at not more than the legal maximum prices as it intended to do, and as it actually did

with the replacements. The use of the replacement cost as a basis for just compensation also gave the respondent a preferred status over other meat wholesalers whose property was not taken by the Government. Cf. *United States v. Delano Park Homes, Inc.*, 146 F. 2d 473, 474 (C. C. A. 2).

The error of the court below in its use of the higher replacement cost of the requisitioned property as a measure of just compensation becomes plain when the underlying facts are viewed in the light of this Court's pronouncement in the case of *United States v. Petty Motor Co.*, 327 U. S. 372, 377-378, that:

* * * just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings.

The respondent's purposes in obtaining the replacements, were, as found by the court below, to protect its good will and retain its organiza-

tion of plant and employees (R. 11). Hence, the replacement used by the court below to ascertain just compensation, was a value particular to the respondent, since the loss sustained in obtaining the replacements stemmed not from the requisition but from the irrelevant fact that the respondent desired to maintain the good will of its customers and to hold its organization intact. Consequently, the court below erroneously measured the just compensation to be paid for the requisitioned property by a special value which the owner, for its own particular purposes, placed upon it, and not upon the general value which prevailed in the ready market. Thus, the court below failed to recognize that "the sovereign must pay only for what it takes, not for opportunities which the owner may lose" by frustration of future business dealings, or through consequential injury to his business as a going concern. See *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U. S. 266, 281-282.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JANUARY 1947

